UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**Case No.: FIFRA 09-2009-0013**
United States Environmental Protection Agency, Region IX, Petitioner, and **Bug Bam Products, LLC,** Respondent.	**CONSOLIDATED MOTION IN OPPOSITION TO COMPLAINANT'S MOTION TO FILE FIRST AMENDED COMPLAINT AND SUPPLEMENT TO AMENDED COMPLAINT**

CONSOLIDATED MOTION IN OPPOSITION TO AMENDED COMPLAINT AND SUPPLEMENT TO AMENDED COMPLAINT

Bug Bam Products, LLC, by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby opposes Complainant's Motion to File First Amended Complaint (the "First Motion" or "Motion") and Complainant's Supplement to Motion for Leave to File First Amended Complaint (the "Supplement") filed in this matter by Region IX of the United States Environmental Protection Agency ("EPA" or "Complainant") for the reasons discussed below.

I. PRELIMINARY STATEMENT

On September 18, 2009, Complainant lodged its Complaint against Bug Bam, claiming that Bug Bam violated Section 12(a)(1)(a) of FIFRA by selling/distributing pesticides not registered pursuant to Section 3 of FIFRA. Orig. Compl. at ¶ 14, 19, 24. Bug Bam responded to

the Complaint by filing an Answer on October 15, 2009. The Answer denied that Bug Bam had distributed or sold unregistered pesticides. Answer at ¶ 14, 19, 24. The Answer further denied that Bug Bam had made statements claiming that Bug Bam protected users from specific diseases carried by mosquitoes. *Id.* at ¶8.

In response to Bug Bam's Answer, Complainant filed its First Motion on November 18, 2009. Bug Bam received a copy of the First Motion on the same date. The Motion seeks to add Flash Sales, Inc. ("Flash Sales") as a party to this action, and further elaborates on the Complainant's position with respect to Bug Bam's exclusion from the minimum risk pesticide exemption of FIFRA Section 25(b). The next day, on November 19, 2009, EPA filed, and Bug Bam received, its Supplement Motion requesting to increase the penalties sought due to the proposed addition of Flash Sales as a party. For the following reasons, Bug Bam opposes Complainant's First Motion and Supplement.

II. ARGUMENT – FIRST MOTION

A. Bug Bam opposes the suggested addition of Flash Sales to this action because EPA unduly delayed adding Flash Sales as a party.

Motions to amend an administrative complaint are inappropriate if they present undue delay, bad faith motives by the movant, undue prejudice, or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 181-182 (1962). The movant has the burden to provide a satisfactory and valid explanation for the delay in including individuals as defendants. *In re Zalcon, Inc.*, RCRA 05-2004-0019 at 6 (Apr. 21, 2006) (quoting *Cartier v. Four Star Jewelry Creations, Inc.*, Civ No. 01-11295(CBM), 2004 U.S. Dist. LEXIS 989 (S.D.N.Y. Jan. 27, 2004)). Explanations for delay in amending a complaint to add a party are insufficient or invalid where the facts and theory for relief against the party were known at the time of the initial complaint. *In re Carroll Oil, Co.*, RCRA 8-99-05 (Apr. 30, 2001).

EPA's delay in adding a defendant must be explainable for EPA to successfully amend its complaint to include the new defendant. In *Zalcon*, EPA attempted to add corporate officers to a complaint against the corporation with which the officers were associated. RCRA 05-2004-0019 at 2. Though EPA was aware of the existence of the corporate officers, EPA did not attempt to add them to the complaint until six weeks before the scheduled hearing. *Id.* at 8. Denying EPA's motion to add the officers, the court noted that "sufficient information to support the proposed amendment was known by [EPA] significantly earlier in the proceeding." *Id.* at 7.

Similarly, in *Carroll*, EPA sought to add another corporation to the complaint, citing "new information" as the basis for the request. RCRA 8-99-05 at 2. The "new information" was an invoice that EPA had actually possessed for four months, which indicated that a corporation other than that originally charged had owned the land in question. *Id.* In denying EPA's motion to amend its complaint, the court noted that EPA knew when the answer was filed that another corporation and potential officer could be liable for the alleged violation. *Id.* at 4.

The amendment to add Flash Sales as a party should not be granted because EPA knew Flash Sales distributed the product at the outset. Notwithstanding EPA's assertion that it "became aware that Flash Sales was also a liable party . . . *only through* the facts raised by Respondent's Answer," First Motion at 2 (emphasis added), EPA conversely admits in its proposed Amended Complaint that "Flash Sales sent the product[s] via mail to Mr. Carpenter after purchase of the item of the bugbam.com website on February 25, 2009." Amended Compl. at ¶ 28, 36, 44. The latter statements directly contradict EPA's previous assertion that it only learned of Flash Sales from Respondent's Answer, as EPA was in receipt of the products from Flash Sales before the commencement of this action. As such, much as an invoice in EPA's possession was not "new information" for the purposes of amending a complaint, *Carroll*, RCRA 8-99-05 at 2, neither should shipment information in EPA's possession be considered

"new" enough to amend the complaint. Thus, EPA's First Motion should be denied because EPA inexplicably delayed in adding Flash Sales as a party to this action.

Moreover, where EPA possesses sufficient information to amend a complaint, that information should be brought forward immediately. EPA must have known that the products did not come from Bug Bam, because EPA acknowledges that "Flash Sales sent the products via mail." Amended Compl. at ¶ 28, 36, 44. Instead of drafting the original complaint to reflect such a shipment, EPA waited almost one month to correct its error. Similar to EPA's knowing disregard of potentially liable corporate officers in *Zalcon*, RCRA 05-2004-0019 at 6, EPA knowingly disregarded the existence of a potentially liable distributor-shipper – Flash Sales – in this action. Thus, as in *Zalcon*, the court should deny EPA's First Motion because "sufficient information to support the proposed amendment was known by [EPA] significantly earlier in the proceeding." *Id.*

B. Bug Bam opposes the proposed amendment of Flash Sales, Inc. as a jointly and severally liable party because such an amendment is futile.

An amendment is not frivolous where it has been established by law that a theory of liability may be attached to newly named parties. *In re Jerry Korn and Dairy Health*, FIFRA 10-2000-0061 at 4 (ALJ July 31, 2001). *See also Zalcon*, RCRA 05-2004-0019 at 6 (noting that an amendment is not futile if a colorable basis for the amendment exists). Due to the lack of relationship between Bug Bam and Flash Sales, Complainant's amendment does not satisfy this test.

In *Korn*, the Administrative Law Judge ("ALJ") granted EPA's amendment of its complaint to "pierce the corporate veil" and add two new parties because the record was still developing and no conclusions could be made regarding the liability of the new parties. FIFRA, 10-2000-0061 at 2, 4. *See also In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218 (Mar. 26, 1999) (holding that the president of a pesticide supply business and

the business itself were jointly and severally liable for the unlawful sale and distribution of an unregistered pesticide). Similarly, in *In re William E. Comley, Inc. ("WECCO") and Bleach Tek, Inc. ("TEK")*, the Environmental Appeals Board upheld the award of a joint and several penalty against WECCO and TEK because TEK was WECCO's successor-in-interest. 11 E.A.D. 247 (Jan. 14, 2004).

No similar theory of liability relates to the addition of Flash Sales as a respondent in this action. Flash Sales and Bug Bam have no current business relationship and thus, unlike TEK in *WECCO*, 11 E.A.D. at 247, Flash Sales cannot be considered a successor-in-interest to Bug Bam. Moreover, no issues of vicarious liability arise, as they did in *Antkiewicz*, 8 E.A.D at 241, because Flash Sales was not an employee of Bug Bam at any time relevant to this action. Flash Sales was, and remains, an independent corporate entity. During the period of the sales in question, Flash Sales supervised and used its own employees in its business endeavors and was not under the control of Bug Bam. In short, no vicarious liability was created as between these businesses. The attempt to establish joint and several liability is frivolous and not colorable because Complainant has not established that Flash Sales was an employee of Bug Bam or a successor-in-interest to Bug Bam. Thus, an amendment to add another party to the Complaint based upon principles of joint and several liability should be denied.

C. Expanded claims about the minimum risk pesticide exemption were resolved in voluntary pre-Complaint settlement conferences with Region IX and so should not be permitted.

Complainant is asking to amend its Original Complaint to add paragraphs concerning the minimum risk pesticide exemption. Amended Compl. at ¶14 – 20. With respect to these additional proposed grounds, Bug Bam believes these to be resolved through the voluntary EPA Staff Settlement conferences that it cooperatively engaged in from approximately July 9, 2009 through August 28, 2009. During this time, Bug Bam was able to provide full evidence of the efficacy and safety of its products. During the EPA Staff Settlement Conference period, Bug

Bam quickly complied with removing references on the website concerning "EPA approved ingredients," replacing this statement with "food grade ingredients;" Bug Bam clarified that the elastomer used is a synthetic latex (a listed 25(b) inert) and initiated steps to revise its labeling and sticker existing stock to identify this ingredient as 'synthetic latex;' and Bug Bam agreed to voluntarily discontinue the use of the red colorant which was used at extremely low levels. Bug Bam notes, however, that the red colorant is completely safe: the red pigment at issue made up only 0.02 % of the entire product formulation and was used at levels that fully comply with Food and Drug Administration clearance for use in contact with food at 21 CFR § 178.3297. Moreover, to the best of Bug Bam's knowledge, colorants, though used, are not typically found listed on labels for 25(b) repellant products, which EPA has apparently tolerated and which signals widespread industry misunderstanding.

Bug Bam took several steps in a timely manner to resolve these additional grounds being alleged, and therefore Complainant's request to add these grounds to the Complaint would not serve to limit the proceeding as Complainant further avers, First Motion at 3-4. Thus, Complainant's motion should be denied in relation to those grounds, as the proposed amendments to EPA's Original Complaint had been addressed at the time the Original Complaint was filed.

Further, EPA fails to state a claim upon which relief can be granted in seeking to add to the Original Complaint that Bug Bam claims that "the products were scientifically proven to be an effective mosquito repellant." Amended Compl. at ¶ 19. During EPA Staff Settlement discussions, Bug Bam reviewed the product label with EPA, with Bug Bam noting that the "repel" or "repelling" claims on product labels are truthful claims that can be substantiated with data. It is readily ascertainable from the public information on the Bug Bam website on product safety testing that there is no question that this claim can be adequately supported. EPA expressly permits true safety claims on labels of Section 25(b) exempt products. *See* Pesticide

Registration Notice 2000-6 (May 7, 2000). Because Section 25(b) exempt products are subject to the FIFRA proscription against false and misleading labeling, EPA necessarily views true safety claims as not inherently misleading. The statement is also not a claim of the absolute safety of the product. As such, the claim is not inherently misleading in the sense that it can be said that no pesticide is absolutely safe under all circumstances. The EPA Label Review Manual guidance cannot be a basis for preventing this claim because it is not applicable to advertising. As the U.S. Supreme Court has admonished, "if there are circumstances in which the speech is not misleading, it is entitled to the protection of the First Amendment." *See Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995). Indeed, such First Amendment protection applies in the case of insect repellent products claimed to be "Safe for Kids." *See Bioganic Safety Brands, Inc. v. Don Ament, Colorado Commissioner of Agriculture*, 174 F. Supp. 2d 1168 (D. Colo. 2001) (holding that the "Safe for Kids" claim for a Section 25(b)-exempt insect repellent product is not inherently misleading and worthy of First Amendment protection). As protected commercial speech, EPA must demonstrate that it has a substantial government interest that would justify its attempts to stifle speech, that the action directly advances that substantial interest, and the action is not more extensive than is necessary to serve the substantial State interest. *See Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980). But here, the public interest in encouraging people to use insect repellents is assisted rather than deterred by the label statement Complainant cites.

Complainant also re-asserts that "Bug Bam claimed . . . [to] protect users from specific diseases carried by mosquitoes." Amended Compl. at ¶ 18. This claim is repetitive of the claim in the Original Complaint. Complainant continues to avoid offering any further information to explain and support the re-asserted claim, rendering Bug Bam's ability to provide an effective response impossible.

Complainant also asserts that Bug Bam's packaging did not list each active ingredient individually. Amended Compl. at ¶ 14. This was an inadvertent error that was not realized until after distribution took place. Bug Bam notes, however, that the error was corrected on April 1, 2009, well before Complainant's Original Complaint was filed and before EPA Staff Settlement discussions began this past summer.

Due to the resolution of the labeling, the claims, and the ingredient matters cited in the First Motion's Amended Complaint during settlement negotiations, Bug Bam views Complainant's decision to file a Complaint as related to the continued pressure on the EPA to treat 25(b) products as if they were hazardous chemical products, and views the Agency's decision as financially-motivated.

III. ARGUMENT – SUPPLEMENTAL MOTION

A. The new proposed fine is inappropriate, as the basis for the increase does not comply with EPA's penalty calculation method, and the fine has been increased without reason and only due to the opposed addition of Flash Sales as a party.

A penalty under FIFRA must account for the gravity of the violation. FIFRA § 14(a). Active cooperation with EPA in a timely manner is a mitigating factor. *In re Aquarium Products*, IFR&R III-439-C (June 30, 1995).

Both Complainant's old and proposed penalties do not comport with penalty calculation policies set forth in the FIFRA Enforcement Response Policy ("ERP"). In the Original and Amended Complaint, Complainant fails to explain its penalty calculation, as well as its departure from the FIFRA ERP guidelines. Such an explanation is particularly necessary because Bug Bam has made substantial efforts to cooperate with EPA, has never before been subject to an enforcement action, and manufactures a safe product with no potential for human or environmental harm. For facts such as these, a Notice of Warning ("NOW") is a recommended action under the FIFRA ERP. FIFRA ERP at C-I, Table 3. One can only assume that

Complainant is trying to profit from Bug Bam, as Complainant has continually failed to explain its decision to seek penalties for issues that are already resolved.

With respect to the original penalties pled by Complainant, the calculations utilized do not accurately reflect the calculations required by the FIFRA ERP. Again, the FIFRA ERP dictates that, for gravity adjustment values below three, the enforcement remedy should be a 50% reduction in the total proposed penalty, a Notice of Warning ("NOW"), or no action. FIFRA ERP at C-1, Table 3. Gravity adjustment is appropriate for Bug Bam products and should be two, as calculated from adjustments for lack of "human harm" and for lack of "environmental harm." *Id.* at B-1. Bug Bam's good faith efforts to comply and remain in compliance, in addition to Bug Bam's previously clean enforcement record should have been reflected in a decreased proposed penalty. In its Supplement, EPA further asserts that "the adjustment of the penalty is necessary to conform the proposed penalty to the facts and circumstances surrounding the violations and the proper application of the ERP." Suppl. at 3. A "proper" application of the ERP would not combine the revenues of two separate and unrelated corporate entities. Thus, EPA's request to increase the proper penalty to $5,099 per count, or $15,300 in total, should be rejected. Suppl. at 2.

In addition, active cooperation with EPA should be taken into account when proposing civil penalty values. In *Aquarium Products*, EPA alleged that Aquarium Products sold an unregistered pesticide, found during an inspection of an Aquarium Products facility. IFR&R III-439-C at 6. At the time of the inspection, Aquarium Products offered to alleviate EPA's concerns by changing its product labels and timely compiled with all EPA demands. *Id.* at 27. Thus, the ALJ found that the penalty contemplated by EPA should have been mitigated by the cooperative stance and efforts of Aquarium Products. *But see In re Martex Farms, S.E.*, FIFRA 02-2005-5301 at 48, 50 (EAB Feb. 14, 2008) (positive attitude and good faith at an indeterminate time or after the filing of the complaint do not amount to mitigating factors where the violator

has chosen to litigate a matter, rather than negotiate a settlement. Unlike the respondent in *Martex Farms*, Bug Bam undertook cooperative and actual corrective measures during settlement discussions before the Original Complaint was filed).

In this case, and as described in detail in Section II(C) above, Bug Bam took active steps to cooperate with Complainant and to address Complainant's requests. The old and new proposed penalties, however, nowhere recognize that Bug Bam cooperatively participated in the EPA Staff Settlement process for six weeks, during which time several actions were taken to meet EPA demands. Because Bug Bam made all the preceding changes quickly, Bug Bam demonstrated the same cooperative approach recognized as a mitigating factor in *Aquarium Products*. As such, the increased penalty suggested by Complainant in its Supplement should be denied.

IV. CONCLUSION

For the reasons set forth above, Bug Bam opposes EPA's First Motion and Supplement. Bug Bam moves the Presiding Officer to deny Complainant's leave to file and serve upon Bug Bam and Flash Sales the First Amended Complaint, as modified by the Supplement, pursuant to 40 C.F.R. 22.16(c).

Dated this 2nd day of December, 2009

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CERTIFICATE OF SERVICE

I, Martha E. Marrapese, hereby certify that on December 2, 2009, I sent the original of the foregoing Bug Bam Products, LLC's Consolidated Motion to Oppose U.S. EPA's Motion for Leave to File an Amended Complaint and Supplement to the Amended Complaint via Federal Express to:

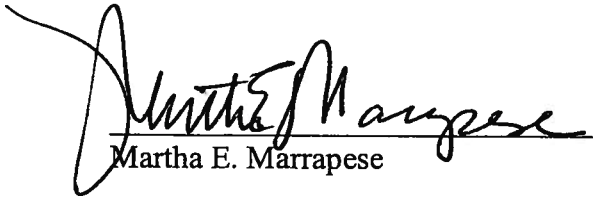
1. Mr. Steven Armsey
   Acting Regional Hearing Clerk
   U.S. Environmental Protection Agency, Region IX
   75 Hawthorne Street (ORC-1)
   San Francisco, CA 94105

and one copy of the foregoing Motion via hand delivery to:

1. Honorable Susan L. Biro
   U.S. Environmental Protection Agency
   Office of Administrative Law Judges
   Franklin Court, Suite 350
   1099 14th St. NW
   Washington, DC 20005

and one copy via Federal Express to:

3. Mr. Ivan Lieben
   Assistant Regional Counsel (ORC-3)
   U.S. Environmental Protection Agency, Region IX
   75 Hawthorne Street
   San Francisco, CA 94105



Martha E. Marrapese